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No. 574 October Term 1967

IN THE

Supreme Court of the United States

MODERN LIFE INSURANCE COMPANY,

Appellant,

—against—

BERNARD WOLFMAN,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Plaintiff suggests that the appeal should be dismissed for three reasons: (1) that defendant is mistaken as a matter of law in stating that delivery of the policy was made in New York (Motion, pp. 4-6); (2) that defendant and the Supreme Judicial Court were mistaken as a matter of fact in treating the transaction as an assignment (*id.* pp. 6-7); and (3) that the balance of conveniences does not incline toward trial in New York (*id.* pp. 8-9).

(1) The premise of plaintiff's first contention, that defendant delivered the policy in suit in Massachusetts, is that *Jones* v. *Metropolitan Life Insurance Company*, 158 Misc. 466, 286 N.Y. Supp. 4 (App. Term, 1st Dept. 1936), cited in the Jurisdictional Statement (p. 12), does not govern the question since New York law is not applicable. Plaintiff does not cite any authority for that proposition,

and the fact of the matter is that the Supreme Judicial Court, which has the final word on the question what law governs in a Massachusetts action, looked to the law of New York exclusively in deciding the question (Jur. St., p. 7a). The Court's error was its assumption that, once Sacks was conceded to be defendant's agent at the time he received the policy, it followed that transmission of the policy by defendant to him was not "delivery" to plaintiff. *Jones*, which is the law of New York, holds the opposite.

Plaintiff argues alternatively that *Jones* is distinguishable on the ground that plaintiff in the instant case directed that the policy be mailed to him. It is plaintiff's contention that under those circumstances "delivery" can become effective only if and when made in accordance with those directions. The fallacy of plaintiff's argument is immediately apparent. The term "delivery", if it is to have any meaning significant in the process of deciding whether defendant did business in Massachusetts, means such relinquishment of the policy as signifies the intention of the insurer that the contract is to be effective. Such was defendant's intention when it transmitted the policy to Sacks. Sacks was not to process the policy. He had no function other than that of a conduit. The policy was transmitted to him because the transaction had been channelled through him from the outset. We note in passing that plaintiff's assertion (Motion, p. 6 n.) that the delivery to Sacks was "for delivery to the insured" flies in the face of the Supreme Judicial Court's finding quoted, with omissions, at page 5 of plaintiff's brief that "The inference is inescapable that if there was a mailing to Sacks it was with instructions to mail the policy to Wolfman." (Jur. St. p. 7a). In any event, the question of "delivery" is only significant to the extent that it throws light on the ultimate issue before the Court: whether

defendant's actions amounted to an exercise of the privilege of doing business in Massachusetts. Defendant respectfully submits that by no stretch of the imagination can the act by an insurer of transmitting the policy and other papers to the insured's assignee be considered the exercise of the privilege of doing business in the home state of the assignee.

(2) Plaintiff contends, next, that the dealings between plaintiff and defendant were not dealings between an insurer and its insured's assignee. The dealings between plaintiff and defendant, he argues, were "not unlike the negotiations *de novo* for a policy of insurance." (Motion, p. 7). Plaintiff would have it appear that what Wolfman did was to apply for a policy of insurance on Stricker's life from Massachusetts. Plaintiff made the same argument in his brief before the Supreme Judicial Court. Suffice it to say that both the trial court and the Supreme Judicial Court rejected plaintiff's argument out of hand. The Superior Court found that "Sterlini knew that the plaintiff was taking an assignment of this policy . . ." (Jur. St. p. 13a), and the Supreme Judicial Court held that "Wolfman, being an assignee of the policy . . . had . . the right to sue thereon." (*Id.* p. 6a). Far from adopting plaintiff's view that defendant sold the policy to Wolfman, the Court made its ruling in plaintiff's favor on the ground that "We think, however, that acts other than selilng a policy may be voluntary business activity within the rule. . . ." (*Id.* p. 11a).

There is no reason why this Court should consider the facts in a different light, for plaintiff's argument hangs on a very slender thread indeed. It depends entirely on the fortuitous circumstances that, when plaintiff first called defendant, no premium had yet been paid, and, therefore, under the terms of the policy, the contract had not

technically become effective. Plaintiff's point is that defendant could have refused to recognize the assignment and have required plaintiff to start afresh, with a new application for a new policy. The fact of the matter is that defendant did not do so but instead treated plaintiff as the assignee, as did all of the other parties to the transaction. That is the record on which this Court must decide whether the Supreme Judicial Court was justified in holding that defendant exercised the privilege of doing business in Massachusetts.

We feel constrained to point out, finally, that plaintiff commits a serious error when he argues that "in Wolfman's discussion with Sterlini arrangements were made to bring into existence a reduced policy of insurance. . . ." The fact is that Stricker, the insured, had already told defendant, in New York, to reduce the amount of the policy, and, when plaintiff called defendant, the amendment by which the policy was to be reduced was already "in the process of being issued." (Tr. p. 24).

(3) In his third point, plaintiff asserts that there are contacts with Massachusetts which make trial more convenient there than in New York, but plaintiff bases that argument on mere surmise and conjecture. Plaintiff does not point to any support in the record for his assertions (apart from the fact that Stricker was a Maryland resident at the time of the application), and hence the Court cannot consider plaintiff's argument in that respect.

By basing his arguments on a proposition of law which is demonstrably erroneous ((1), *supra*) and upon a view of the facts which is patently untenable ((2), *supra*) and upon surmise and conjecture without support in the record ((3), *supra*), plaintiff, far from making a case for dismissal or affirmance, has made a good case for a summary reversal.

CONCLUSION

The motion should be denied and the Court should summarily reverse the judgment of the Supreme Judicial Court or set down the cause for oral argument.

Respectfully submitted,

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